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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE MENDOZA-LOPEZ AND
ANGEL LANDEROS-QUINONES

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Page

Cases:

Lewis v. *United States*, 445 U.S. 55 (1980) 8-9

Mills v. *United States*, 273 F. 625 (9th Cir. 1921) 4

P, In re, 3 I. & N. Dec. 818 (1949) 4

United States v. *Spector*, 343 U.S. 169 (1952) 7

United States ex rel. Bartsch v. *Watkins*, 175 F.2d 245 (2d Cir. 1949) 2

United States ex rel. Beck v. *Neelly*, 202 F.2d 221 (7th Cir.), cert. denied, 345 U.S. 997 (1953) 4

United States ex rel. Koehler v. *Corsi*, 60 F.2d 123 (2d Cir. 1932) 2, 4

United States ex rel. Rubio v. *Jordan*, 190 F.2d 573 (7th Cir. 1951) 3

United States ex rel. Steffner v. *Carmichael*, 183 F.2d 19 (5th Cir.), cert. denied, 340 U.S. 829 (1950) 3, 4

Yakus v. *United States*, 321 U.S. 414 (1944) 8

Statutes:

8 U.S.C. (1946 ed.) 137(h) 2

8 U.S.C. (1946 ed.) 138 ..... 2, 4

8 U.S.C. (1946 ed.) 155 ..... 4, 6

Page

Statutes—Continued:

8 U.S.C. (1946 ed.) 155(a) 2, 3, 6
8 U.S.C. (1946 ed.) 180 ..... 1, 2, 3, 6
8 U.S.C. 1105a(a) 6
8 U.S.C. 1105a(c) 6
8 U.S.C. 1252(d) 7
8 U.S.C. (Supp. III) 1252(e) 7
8 U.S.C. 1326 ..... 1, 2, 3, 5, 6, 7, 8

Miscellaneous:

S. Rep. 1515, 81st Cong., 2d Sess. (1950) 5

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1. In our opening brief, we argued that the courts of appeals that have permitted collateral attacks on the validity of deportation proceedings in criminal prosecutions under 8 U.S.C. 1326 have simply read the word "lawfully" into the statute. In our view, Congress enacted Section 1326 to criminalize the act of reentering the United States following deportation. The language of Section 1326, which does not mention the lawfulness of the deportation, is inconsistent with allowing collateral review of the deportation proceedings in criminal prosecutions. In support of that contention, we noted that Section 1326 was based on 8 U.S.C. (1946 ed.) 180, which provided for two years' imprisonment and the exclusion of "any alien * * * arrested and deported in pursuance of law, * * * [who] enters or attempts to enter the United States." We pointed out that the fact that Congress deleted the phrase "in pursuance of law" when it

enacted Section 1326 confirms that Congress did not intend to permit the underlying deportation proceedings to be subject to collateral review.

Amicus American Civil Liberties Union (ACLU) draws a different conclusion from the legislative history of Section 1326. The ACLU notes that prior to the enactment of Section 1326 in 1952, three statutes other than Section 180 prohibited reentry by deported aliens: 8 U.S.C. (1946 ed.) 137(h) provided that deported anarchists who returned were subject to deportation and to five years' imprisonment; 8 U.S.C. (1946 ed.) 138 provided that aliens who returned after being deported in connection with prostitution offenses were subject to two years' imprisonment; and 8 U.S.C. (1946 ed.) 155(a) provided that a variety of "undesirable aliens," including aliens who returned after being deported, were deportable. According to the ACLU, "[t]he case law allowing collateral attack under the predecessor statutes to Section 1326 is considerable" (Br. 12), and Congress did not intend to overturn that "long-established legal principle[ ]" (Br. 18) by enacting the "more succinct" (Br. 21) language of Section 1326. This argument is flawed in several respects.

Contrary to the ACLU's assertion, there was no clear right to collaterally attack the validity of deportation proceedings under the predecessor statutes to Section 1326. The ACLU acknowledges that in *United States ex rel. Koehler* v. *Corsi*, 60 F.2d 123 (2d Cir. 1932), the court rejected an argument that it should collaterally review a prior deportation order in a proceeding under Section 180, stating that "it is now too late to attack that deportation as one not in pursuance of law" (60 F.2d at 123). The two cases the ACLU cites besides *Corsi* that involved Section 180 do not establish any clear right to collateral attack. In *United States ex rel. Bartsch* v. *Watkins*, 175 F.2d 245, 247 (2d Cir. 1949), the court did not decide whether collateral

review was warranted, concluding instead that "it is unnecessary to determine the validity of the 1946 deportation" justifying the deportation at issue. In *United States ex rel. Rubio* v. *Jordan*, 190 F.2d 573, 575-576 (7th Cir. 1951), the court stated that "valid reasons are assigned for not permitting such collateral attacks on former deportation proceedings" unless the court is convinced that there was a gross miscarriage of justice in those proceedings. The court in *Jordan* went on to state that "[h]ere we find no such gross miscarriage of justice in the former deportation proceedings as would justify our review of those proceedings" (*id.* at 576). Thus, the three cases construing Section 180 hardly support the proposition that collateral attacks were permissible under that provision, even though that provision applied only when an alien had previously been deported "in pursuance of law." Rather, one of the cases held that collateral attack was not permissible, one of the cases did not decide the issue, and the remaining case stated that collateral attack was available only in exceptional circumstances involving a gross miscarriage of justice.*

The cases involving statutes other than Section 180 also do not support the ACLU's claim that prior to the enactment of Section 1326 there was a clearly established right to collaterally attack deportation orders. In *United States ex rel. Steffner* v. *Carmichael*, 183 F.2d 19, 20 (5th Cir.), cert. denied, 340 U.S. 829 (1950), a case decided under Section 155(a), the court merely suggested that in the event of a gross miscarriage of justice it might review a prior deportation order. The court went on to state that "[e]ven if we were

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*A rule that collateral attack is permissible to correct a gross miscarriage of justice would not help respondents. The irregularity identified by the district court was that, while technically complying with regulations requiring that he notify respondents of their eligibility to apply for suspension of deportation, the immigration judge did not adequately explain that option to them (Pet. App. 22a-23a).

to concede that we should examine the order entered in his 1936 deportation proceeding, appellant would not be in any better position than he is now, because we are of the opinion that such order was valid when entered" (183 F.2d at 21). In *United States ex rel. Beck* v. *Neelly*, 202 F.2d 221 (7th Cir.), cert. denied, 345 U.S. 997 (1953), also a Section 155 case, the court did not decide whether prior deportation proceedings were subject to collateral attack. The court cited *Carmichael* and *Corsi*, and it prefaced its rejection of the alien's claim that his prior deportation proceeding was unlawful by expressly declining to decide whether "petitioner may collaterally attack the record of previous deportation proceedings" (202 F.2d at 222 & n.1). In prior proceedings in that case, the Board of Immigration Appeals had quoted *Corsi* in support of its conclusion that " 'it is now too late to attack that deportation as one not in pursuance of law' " (*In re P*, 3 I. & N. Dec. 818, 820 (1949)). Finally, in *Mills* v. *United States*, 273 F. 625, 626 (9th Cir. 1921), a case decided under Section 138, the court rejected an alien's challenge to the prior deportation order that formed the basis for the alien's subsequent indictment for returning to this country after having been deported for prostitution. While the court in that case reviewed the validity of the deportation order, it did not consider whether the statute permitted such collateral attack, an issue that apparently was not raised.

In short, the state of the law in 1952 does not support the ACLU's assertion that "[t]he case law allowing collateral attack under the predecessor statutes to Section 1326 is considerable" (Br. 12), and that permitting such collateral attacks was a "long-established legal principle[ ]" (Br. 18). One court had held that collateral review was not warranted, and the Board of Immigration Appeals had agreed with that view; two courts had discussed but not decided the issue; another court had rejected a claim that a prior deportation was invalid without considering whether collateral

attack was warranted; and, as we stated in our opening brief (at 13 n.10), two courts had suggested that collateral attack might be warranted to remedy a gross miscarriage of justice. That is hardly a "considerable" body of case law demonstrating a "long-established legal principle" authorizing collateral attack on the validity of deportation orders.

The ACLU next distorts the legislative history by claiming that when it enacted Section 1326, Congress intended "that existing law 'be substantially reenacted,' with only superficial changes" (Br. 20, quoting S. Rep. 1515, 81st Cong., 2d Sess. 656 (1950)). The ACLU's quotation is taken from a report issued two years before Section 1326 was enacted, not at the time of the enactment of Section 1326. More importantly, it was the judicial and administrative penalties that the report recommended be "substantially reenacted," not "the existing law." Thus, even if there were a considerable body of case law establishing a right to collateral attack, the legislative history does not indicate that Congress intended to carry forward that body of law; it merely indicates that Congress meant to carry forward the penalties for reentry following deportation.

The ACLU's explanation of how Congress happened to delete the phrase "in pursuance of law" is fanciful. According to the ACLU, Congress did not intend anything by the change—Congress "simply used the more succinct language of Section 155 for the new felony provision" (Br. 21). In fact, if Congress had wanted to be more succinct, yet retain language suggesting that collateral attack was permissible, it could have replaced the phrase "in pursuance of law" with the single word "lawfully." It did not. The obvious inference to be drawn from Congress's deletion of the phrase is that Congress did not intend to permit collateral attacks on

the validity of prior deportation proceedings in criminal prosecutions for reentering the United States after having been deported.

Moreover, the evidence is clear that it was Section 180, not Section 155, that served as the model for the present Section 1326. As we noted in our opening brief (at 14 n.12), the House Report on the Immigration and Nationality Act of 1952 printed Section 180, not Section 155, next to Section 1326 in comparing the "existing law" to "the proposed law." And it is simply not true that the language of Section 1326 "tracks" the language of Section 155, as the ACLU asserts (Br. 21). In making that claim, the ACLU is referring to the phrase "excluded and deported or arrested and deported," which appears in both statutes. However, the phrase appeared in Section 155(a) as the 345th through 351st words of the statute. A cursory examination of that statute, which is anything but succinct, and which was not a criminal statute, shows that it plainly was not the model for Section 1326.

2. We also noted in our opening brief that 8 U.S.C. 1105a(a) provides the "sole and exclusive procedure for * * * judicial review of all final orders of deportation." That provision supports the view that deportation orders are not subject to collateral attack in criminal prosecutions under Section 1326. That conclusion is further reinforced by Section 1105a(c), which provides that an "order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order."

Respondents (Br. 14-15) and the ACLU (Br. 22-31) argue that the legislative history shows that when it enacted Section 1105a, Congress was focusing on the problem of deportation delays. In their view, this Court should therefore hold that what Congress clearly stated in Section 1105a should

not apply to prosecutions brought under Section 1326. That response is inadequate. The plain language of the statute may not be ignored on the ground that the legislative history indicates that Congress was principally concerned with addressing a somewhat different problem.

The ACLU also argues (Br. 27-28) that it would be anomalous to permit collateral attacks in prosecutions for failing to leave the country after being ordered to depart and not to permit collateral attacks in prosecutions for returning after being deported. There is no anomaly. As we noted in our opening brief (at 17 n.14), there are at least two reasons why Congress might have intended to permit collateral attacks in the one case and not in the other. Collateral attack in cases involving aliens who have not departed may be justified because those aliens may be unable to find a country that would accept them, a point discussed by the dissenters in *United States* v. *Spector*, 343 U.S. 169, 179-180 (1952). Collateral attack in "failure to depart" cases may be justified because, in general, there will be a much longer delay between the issuance of a deportation order and a prosecution for unlawful reentry than there will be between the issuance of a deportation order and a prosecution for failure to depart. Allowing collateral attack in reentry cases is therefore likely to pose much more serious practical problems. The ACLU ignores both of those reasons that would justify permitting collateral attacks in prosecutions under 8 U.S.C. 1252(d) and 8 U.S.C. (Supp. III) 1252(e), while precluding such collateral attacks in prosecutions under Section 1326.

3. Respondents primarily argue that fundamental fairness requires that they be permitted to collaterally attack the validity of their deportation proceedings. In particular, they repeatedly complain (Br. 6, 7, 10-11, 15) that they had no realistic opportunity to challenge their deportation orders because they were escorted across the border two days after their deportation hearing. However, respondents

do not deny that, in response to the immigration judge's question, they waived their right to appeal (Pet. App. 22a-23a). It is not clear what respondents think the Immigration and Naturalization Service ought to do with aliens ordered deported who waive their right to appeal. It seems clear that it is in everyone's interest to deport them promptly. To be sure, it would be unfair to deport an alien before the time to appeal had run and before the alien had decided whether to appeal. Once an alien waives his right to appeal, however, neither he nor the government benefits from delaying the deportation. In that circumstance, it would seem more troubling to hold the alien in custody rather than to deport him promptly.

Amicus American Immigration Lawyers Association (AILA) has submitted a brief that documents the obvious fact that deportation proceedings are not criminal proceedings. Like respondents (Br. 9-10) and the ACLU (Br. 31-41), the AILA contends (Br. 26) that it is unfair to permit "an element of a crime to be conclusively established in an administrative proceeding." They fail to recognize that, as we explained in our opening brief (at 21), the elements of the crime prohibited by Section 1326, are (1) reentry into the United States, (2) without the Attorney General's permission, (3) after having been deported. Thus, Congress has criminalized the act of reentry by a previously deported alien. It has not made being a deportable alien—the matter at issue in the administrative proceeding—an element of the crime.

Moreover, as we explained in our opening brief (at 21-23), this Court has held that it is permissible for Congress to prohibit a defendant from challenging the validity of an administrative regulation in a criminal prosecution for violating the regulation (*Yakus* v. *United States*, 321 U.S. 414, 443-446 (1944)) and to prohibit a defendant prosecuted for possessing a firearm after a felony conviction from challenging the validity of the prior felony conviction (*Lewis* v.

United States, 445 U.S. 55, 67 (1980)). This Court has indicated that a different rule might apply if the defendants did not have the opportunity to challenge the prior determination. But respondents had the opportunity to appeal their deportation order, and they waived it. They also had the opportunity to obtain the Attorney General's permission to reenter, but they did not attempt to obtain it. Neither respondents nor amici have advanced any sound reason why Congress cannot make criminal the act of reentry following deportation and prohibit collateral attack on the validity of the deportation order when the defendants had such opportunities and did not take advantage of them.

For these reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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